S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARY PENA, Plaintiff-Appellee,	UNPUBLISHED May 31, 2007
v	No. 265986 Eaton Circuit Court
THOMAS W. MINGUSKE, DDS, and ALTERNATIVE DENTAL SERVICES, Defendants-Appellants.	LC No. 03-001692-NH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's denial of their motion for summary disposition on the grounds that plaintiff failed to file a conforming affidavit of merit and a conforming notice of intent when commencing this malpractice action. For the reasons set forth in this opinion, we reverse the decision of the trial court and remand for entry of summary disposition in favor of defendants.

In her complaint, plaintiff alleges that she treated with defendant Thomas Minguske, DDS, on January 14, 2002, and that Minguske "held himself out as a specialist in the field of prosthodontics and dental reconstruction."[1] After Minguske performed reconstruction and restoration of plaintiff's teeth, plaintiff "immediately began experiencing symptoms of inflammation . . . occlusion and other forms of discomfort in her mouth." After visiting an emergency room, she treated with Robert Humphries, DDS.

[1] Despite repeated attempts during oral argument to ascertain when or exactly how defendant Minguske held himself out as a "specialist in the field of prosthodontics and dental reconstruction," we cannot conclude, with any reasonable certainty, that defendant Minguske ever held himself out as an expert in either of these two specialties. Plaintiff did attach to her brief an affidavit setting forth this claim; however, the affidavit was filed after the trial court's ruling, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), and plaintiff did not move to amend the record pursuant to MCR 7.216(A)(4). In the absence of such a motion, we must consider the actual record and cannot evaluate material that is not of record. *Golden v Baghdoian*, 222 Mich App 220, 222 n 2; 564 NW2d 505 (1997). Therefore, plaintiff's affidavit is not properly before us.

On May 5, 2003, plaintiff filed her notice of intent, which alleged that Minguske breached the applicable standard of care by failing to use "proper occlusal therapy . . . to achieve the necessary spacing before placing crowns and by negligently placing crowns that were open or overhanging." Thereafter, plaintiff filed her complaint alleging one count of negligence against Minguske and one count of vicarious liability against defendant Alternative Dental Services, along with an affidavit of merit signed by Humphries, in which Humphries averred that he practiced dentistry and prosthodontics. Although the affidavit of merit stated that Humphries had reviewed plaintiff's medical records from her treatment with defendants, it did not state that Humphries had reviewed the notice of intent. MCL 600.2912d(1).

Defendants moved for summary disposition, arguing that Humphries, who specialized in prosthodontics, could not sign the affidavit of merit against Minguske, who practiced general dentistry, and that the affidavit of merit failed to provide that Humphries had reviewed the notice of intent as required by MCL 600.2912d(1). In support of their argument, defendants cited Minguske's deposition, in which Minguske testified that he practiced general dentistry, that he held a license in general dentistry and held no other licenses or board certification, and that he agreed that neither "total mouth reconstruction [nor] total dental reconstruction . . . would fall under prosthodontics[.]" Minguske opined in his deposition that general dentists could perform total mouth reconstruction. He stated that he had "taken some courses and certificates in dental implants" and "ha[d] no board certification, except an implant residency, which is not a State of Michigan legal thing." In contrast, defendants cited the Humphries deposition, in which Humphries testified that he has an MS in prosthodontics in addition to his DDS, that he passed the specialty board certification in prosthodontics, and that he was licensed by the State of Michigan as a prosthodontist. Humphries further testified that his practice was limited to prosthodontics since 1989 and that he did not spend a majority of his professional time practicing or teaching general dentistry during either the past 18 years or from 2000 to 2001. When asked if he had ever reviewed the notice of intent, Humphries replied, "I don't ever believe seeing that." He also stated that he did not believe he had seen the complaint.

The trial court denied defendants' motion, holding as follows:

> Well, I think *Cox*[2] is somewhat instructive here. And I'm obligated to look at things in the light most favorable to the nonmoving party here.
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> I don't necessarily buy your argument regarding the health care professional or the definition of that being broad enough to include a dentist, although I'm not sure. But I think there's a question of fact there.
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> I'm going to deny your motion and I am going to allow him to clean up the affidavit of merit. Apparently we're missing one sentence there. And if that provides some type of a basis for appeal and the eventual dismissal of this claim, so be it. But I'm going to allow him to amend it.

[2] *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 19; 651 NW2d 356 (2002).

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). In reviewing a decision under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless specifically contradicted by affidavits or other appropriate documents. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). In reviewing a decision under MCR 2.116(C)(10), this Court considers all documentary evidence in the light most favorable to the nonmoving party to decide whether there is any genuine issue of material fact that would entitle the nonmoving party to judgment as a matter of law. *Diamond v Witherspoon*, 265 Mich App 673, 681-682; 696 NW2d 770 (2005); *Wilcoxon*, *supra* at 357-358.[3] Speculation and conjecture cannot establish a genuine issue of material fact. *Ghaffari v Turner Const Co*, 268 Mich App 460, 464-465; 708 NW2d 448 (2005).

Defendants argue that the trial court erred in denying their motion for summary disposition because plaintiff's affidavit of merit was executed by a prosthodontist who did not practice general dentistry and therefore was not qualified as an expert witness under MCL 600.2169.

MCL 600.2912d provides:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> (a) The applicable standard of practice or care.
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> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

[3] Although defendants also moved for summary disposition under MCR 2.116(C)(8), both parties relied on evidence beyond the pleadings to support their positions. Further, in denying their motion, the trial court ruled that plaintiff had established a question of fact.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

Under MCL 600.2912d(1), the plaintiff or the plaintiff's attorney must file an affidavit of merit along with the complaint. The affidavit of merit must be signed by a health professional who the plaintiff's attorney reasonably believes could testify as an expert witness under MCL 600.2169. MCL 600.2912d(1). Citing our Supreme Court's decision in *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 18; 651 NW2d 356 (2002) (holding that nurses are neither "general practitioners" nor "specialists" because they do not engage in the practice of medicine and that MCL 600.2912a does not apply to nurses), plaintiff argues that because a malpractice claim against a dentist is a dental malpractice claim as opposed to a medical malpractice claim, MCL 600.2912d does not apply to this case. Plaintiff further argues that even if *Cox* is inapplicable, it was reasonable for counsel for plaintiff to believe that the decision in *Cox* reversed this Court's prior decision in *Decker v Flood*, 248 Mich App 75, 83-84; 638 NW2d 163 (2001) and that a dentist specializing in prosthodontics was therefore qualified to testify against defendant Minguske, a dentist engaged in general practice, under MCL 600.2169. In *Decker*, this court held, under facts nearly identical to the facts in the instant case, that an endodontist, who was a specialist, was not qualified under MCL 600.2169(1)(c) to give expert testimony concerning the standard of care against a dentist who was a general practitioner. According to this Court in *Decker*, because the endodontist was not qualified under MCL 600.2169(1)(c) to give expert testimony, his affidavit of merit did not satisfy the requirements of MCL 600.2912d(1). Thus, plaintiff argues that despite this Court's ruling in *Decker*, it was reasonable to believe that in light of *Cox*, neither MCL 600.2912d nor this Court's decision in *Decker* were applicable.

In *Cox*, our Supreme Court observed that "a medical malpractice claim may be brought against *any* 'licensed health care professional.'" *Cox*, *supra* at 19, quoting MCL 600.5838a(1) (emphasis added). MCL 600.5838a(1)(b) defines a "[l]icensed health care professional" as "an individual licensed or registered under article 15 of the public health code, . . . [that] being sections 333.16101 to 333.18838 of the Michigan Compiled Laws." MCL 333.16601(c) defines "[d]entist [as] an individual licensed under this article to engage in the practice of dentistry." Accordingly, because there is no dispute that Minguske was licensed as a dentist under the health code, plaintiff's claim is a medical malpractice claim as a matter of law, and MCL 600.2912d applies.

In light of *Decker*, we are persuaded by defendants' argument that the affiant, who is board certified in and limited his practice to the dental specialty of prosthodontics, is not

qualified to sign and certify an affidavit of merit against Minguske, who practiced only general dentistry and held no board certifications. *Decker*, *supra.* As noted above, in *Decker*, this Court held that an affiant who limited his practice to endodontics was not qualified to sign and certify an affidavit of merit against a defendant practicing general dentistry, reasoning as follows:

> Applying the ordinary meaning of general practitioner as one who does not limit his practice to any particular branch of medicine, [the affiant] clearly does not satisfy the requirements of MCL 600.2169 and, therefore, would not be qualified to offer expert testimony on the standard of practice of a general practitioner, such as [the] defendant . . . . Because [the affiant] is precluded by MCL 600.2169 from testifying regarding defendant's standard of practice, there is no genuine dispute that the affidavit of merit attached to plaintiffs' complaint does not comply with the requirements of MCL 600.2912d(1), and defendants were entitled to judgment as a matter of law. [*Decker*, *supra* at 83-84.]

Here, as in *Decker*, the affiant expressly limited his practice to a specialty and all of this information was available to plaintiff. See *Geralds v Munson Healthcare*, 259 Mich App 225, 233; 673 NW2d 792 (2003). Thus, under this Court's ruling in *Decker* the affiant did not meet the expert witness qualifications of MCL 600.2169(1).

Moreover, we find that counsel for plaintiff did not have a reasonable belief that a specialist in prosthodontics would be qualified to testify against a dentist engaged in the practice of general dentistry. As previously noted, MCL 600.2912d provides that an affiant whom the plaintiff or the plaintiff's attorney reasonably believes would meet the requirements of MCL 600.2169 must sign the affidavit of merit. MCL 600.2169(1) provides in pertinent part as follows:

> (c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either (one)-check lexis or both of the following:
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> (i) Active clinical practice as a general practitioner.
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> (ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

Plaintiff's argument that she had a reasonable belief that *Cox* overruled *Decker* in ruling that the requirements of MCL 600.2912a do not apply to non-medical practitioners is not persuasive for two reasons. First, *Cox* did not address *Decker* and did not explicitly reverse this Court's ruling in *Decker*. We decline to extend the ruling of *Cox*, which involved a nurse, to the instant case involving a dentist. The facts of the cases are distinguishable. Second, even if we were to concede that post-*Cox* there is a question whether dentists are covered by the statute, plaintiff cannot explain why, as recently as 2005, this Court applied the medical malpractice statute of limitation found in MCL 600.5805(6) to a claim against a dentist and affirmed the

default judgment against defendant for failing to comply with MCL 600.2912e. *Saffian v Simmons*, 267 Mich App 297, 302-304; 704 NW2d 722 (2005).

In light of this Court's published decision in *Decker*, we find that plaintiff did not have a reasonable belief that a prosthodontist was qualified to testify against a dentist engaged in the practice of general dentistry. This Court's ruling in *Decker* clearly states that when a dentist is engaged in the general practice of dentistry, a person making a claim of malpractice must obtain an affidavit of merit from a person engaged in the practice of general dentistry. In this case, the affiant provided by plaintiff was not engaged in the practice of general dentistry and thus is not qualified under MCL 600.2169(1) to testify regarding defendant's standard of practice. Our decision in *Decker* clearly compels the conclusion that plaintiff's affiant in this case, a prosthodontist, was unqualified to provide testimony against defendant, a dentist engaged in the practice of general dentistry. Furthermore, in the absence of language in *Cox* directly overruling *Decker*, we conclude that it was not reasonable for plaintiff's counsel to conclude that *Cox* had overruled *Decker* or that *Decker* was somehow inapplicable. Thus, we find that the affidavit of merit attached to plaintiffs' complaint failed to comply with the requirements of MCL 600.2912d(1), and defendants were entitled to judgment as a matter of law.

Because we reverse the decision of the trial court for the reasons articulated above, we need not address defendants' remaining arguments on appeal.

Reversed and remanded for entry of an order granting summary judgment against plaintiff. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello